STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

NL VENTURES VI FARMINGTON, LLC,

Appellant/Plaintiff,

v.

CITY OF LIVONIA,

Appellee/Defendant.

_____/

S. Ct. Docket No. 153110
COA Docket No. 323144
Circuit Court No. 13-004863-CZ

APPELLEE/PLAINTIFF NL VENTURES VI FARMINGTON, LLC'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

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The Michigan Court of Appeals' December 22, 2016 published Opinion (the "COA Opinion") egregiously misapplied the word "shall" to be discretionary for actions that Defendant/Appellee the City of Livonia ("Defendant") was required to take in connection with annually certifying the water delinquencies at issue in connection with placing them on the tax rolls. *See* COA Opinion, at 6. In its response brief, Defendant does not dispute, nor could it dispute, that the COA Opinion converted a mandatory "shall" action in Defendant's own ordinance (section 13.08.350 (the "Ordinance")) into one that is now discretionary; and Defendant also does not dispute that Defendant failed to timely perform its obligations as unambiguously required by that Ordinance.

Instead, Defendant basically says the Ordinance is meaningless and a nullity. To summarize, Defendant now argues to this Court that the COA Opinion is right because (i) it does not matter whether Defendant complies with the Ordinance (or anything else for that matter) because the water liens at issue are "bullet proof", (ii) even though Defendant is demanding that Plaintiff/Appellant NL Ventures VI Farmington, LLC ("Plaintiff") pay the unpaid water bill of its former tenant (plus 18% per annum penalty interest) under the threat of foreclosure, Plaintiff somehow lacks standing to complain that Defendant has ignored the law and not done what it was required to do in order to be legally entitled to place those water charges onto the tax roll, and (iii) Defendant has absolute immunity from its improper acts which damaged Plaintiff, such as Defendant having secretly signed a subordination agreement which is a proprietary act and not a governmental function.

Defendant's positions are wrong and, among other things, directly violate and contradict long standing judicial precedent that the word "shall" denotes a mandatory act. What Defendant advocates is that the word "shall" means something different depending on whether you are a municipality or a taxpayer. Respectfully, that is wrong. If left to stand, the COA Opinion will result in untold mischief.

Accordingly, Plaintiff respectfully requests that this Court issue an order (1) granting Plaintiff's application for leave to appeal, (2) vacating and reversing the COA Opinion, (3) affirming the Circuit Court Order, (4) awarding Plaintiff costs including attorneys' fees, and (5) awarding Plaintiff any other relief this Court deems necessary and just.

A. The Water Liens Do Not Automatically Get Placed On The Tax Rolls.

The general premise of Defendant's entire argument in this case is that, regardless of the Ordinance, water liens are "bullet proof" and Defendant can place them on the tax rolls anytime it wants regardless of whether Defendant follows the legal procedures for doing so. In support for Defendant's alleged unprecedented grant of power, Defendant regurgitates a number of cases and statutory cites that, collectively, basically stand for the proposition that the water system and water liens are important to the public. Defendant then "takes the leap" and argues that, given the importance of the water system and water liens, Defendant is somehow immune from the law, and Defendant was not required to comply with the Ordinance and timely certify each year the unpaid water charges in order to place them on the tax rolls. Put simply, even though Defendant readily admits it repeatedly violated the Ordinance, those violations do not matter, according to Defendant.

Defendant is wrong, and its violations of the Ordinance do matter for many reasons. To begin, there is nothing in either the 1933 Revenue Bond Act, MCL 141.101, *et seq*. (the "Revenue Bond Act"), the 1939 Municipal Water Lien Act, MCL 123.161 *et seq*. (the "1939 Act"), or the General Property Tax Act, MCL 211.1 *et seq*. (the "GPTA"), which automatically places water liens on the tax rolls for collection purposes. This is critical. Instead, the 1939 Act (MCL 123.163) and the Revenue Bond Act (MCL 141.121(3)) only grant a municipality such as Defendant the option to invoke such a remedy. As discussed in Plaintiff's Application For Leave To Appeal (the "Application"), some municipalities have abstained from this grant of power and chose not to have available the remedy of placing unpaid water charges on the tax rolls for collection and, instead, use other methods for collecting.

If, however, a municipality chooses to exercise the remedy of collecting unpaid water charges by placing them on the tax rolls, then the 1939 Act and the Revenue Bond Act require the municipality to establish and follow their own legal procedures for doing so. And, again, as discussed in the Application, different municipalities have different procedures. Those procedures, however, are for the benefit and protection of taxpayers for whose properties become subject to such water charges and tax foreclosure, and not for the benefit of the bondholders or rate payers (as Defendant now tries to claim).

Here, Defendant, in fact, chose to take advantage of this collection method and passed the Ordinance, which contains the word "shall" five times in connection with what Defendant is required to do in order to invoke the remedy of properly placing unpaid water charges on the tax rolls. It is undisputed that Defendant intentionally and knowingly violated the Ordinance. There is absolutely no authority cited by Defendant (or in the COA Opinion) whatsoever which now grants Defendant a "free pass" for not following its own Ordinance so that Defendant can still exercise the remedy and collect on the tax rolls. This is not some loophole as Defendant claims – this is basic fundamental principles that government cannot just do whatever it wants whenever it wants but, instead, has to follow its own law just like everyone else. Of course, Defendant's failure to follow the Ordinance does not prevent Defendant from exercising its other avenues for collecting which are allowed under Michigan law.[1] It only bars Defendant from placing those unpaid water charges on the tax rolls and then charging Plaintiff 18% per annum interest (and foreclosing by tax sale if the debt is not paid).

Respectfully, if Defendant (and the COA Opinion) are right – which they are not – then all of the different ordinances passed by the various Michigan municipalities which specifically set forth the legally required procedures for placing unpaid water charges on tax rolls for collection, are now totally meaningless, a nullity, and municipalities have no obligation to follow them. *See also Robinson v City of*

[1] Among the available options, Defendant could still initiate a collection action against the tenant.

Lansing, 486 Mich 1; 782 NW2d 171 (2010) ("statutory provisions should not be construed in a manner that renders language within those provisions meaningless"); *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 70; 748 NW2d 524 (2008) ("[A]n interpretation that renders language meaningless must be avoided."). There is now no reason to have any such ordinances or the requirements in MCL 123.163 and MCL 141.121(3). Put simply, under the COA Opinion municipalities can basically do whatever they want, whenever they want, as it suits them, with respect to placing water charges on their tax rolls regardless of the law. Respectfully, that is not, and should not be, the law in Michigan.

B. Plaintiff Has Standing.

Defendant also argues that property owners, like Plaintiff, somehow lack standing to enforce the Ordinance or otherwise complain that Defendant violated and ignored the Ordinance in connection with placing a seven figure amount of water charges on Plaintiff's tax bill. In summary, Defendant argues that under MCL 141.109 only bondholders with 20% or more of the outstanding bonds issued can bring suit to require Defendant to comply with the Ordinance. *See* Defendant's Appeal Brief, at 19-21. Thus, according to Defendant, Defendant can violate and ignore the Ordinance with immunity and take Plaintiff's property, and Plaintiff does not even have a right to complain that Defendant violated the law.[2]

Defendant's arguments are, again, without legal merit. First, there is nothing in the Ordinance to support Defendant's claims that Plaintiff does not have standing. Simply put, there is nothing in the unambiguous and clear language of the Ordinance that says the Ordinance is only for the protection and benefit of bondholders; nor is the clear and unambiguous language of the Ordinance limited only to

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[2] Defendant relies on this Court's decision in *Grand Rapids Independent Pub Co v City of Grand Rapids*, 335 Mich 620; 56 NW2d 403 (1953). *See* Defendant's Appeal Brief, at 19. That decision, however, is not applicable to this case. In the *Grand Rapids* case, certain taxpayers sued to prevent the defendant city from transferring funds from the water works revenue fund to the city's general fund for use by the city. This Court held that to challenge the transfer of such funds plaintiffs needed to hold at least 20 percent of the outstanding bonds. In this case, however, there is no such transfer of funds at issue. Instead, Defendant is trying to improperly impose unpaid water charges on only one person (Plaintiff) in violation of the Ordinance.

bondholders. Defendant has manufactured such a claim with no legal support. The Ordinance is specifically designed to protect taxpayers and property owners, including Plaintiff, from being "blindsided" by receiving a tax bill which contains, for the first time, years of accrued unpaid water charges without timely prior notice.

Second, Defendant's claims regarding MCL 141.109 are also inconsistent with that very statute. MCL 141.109 relates only to bondholders enforcing their liens on the municipality's net revenues which secure the issued bond, and not the water liens on real property like those at issue here. *See also* MCL 141.108 ("[t]here shall be created in the authorizing ordinance a lien, by this act made a statutory lien, upon the net revenues pledged to the payment of the principal of and interest upon such bonds, to and in favor of the holders of such bonds…"). MCL 141.109 permits certain bondholders to enforce their statutory lien against the municipality's net revenues by bringing suit against that municipality to perform its legal duties:

> The net revenues which are pledged shall be and remain subject to the statutory lien until the payment in full of the principal of and interest upon the bonds unless the authorizing ordinance provides for earlier discharge of the lien by substitution of other security. The holder of the bonds, representing in the aggregate not less than 20% of the entire issue then outstanding, may protect and enforce the statutory lien and enforce and compel the performance of all duties of the officials of the borrower, including the fixing of sufficient rates, the collection of revenue, the proper segregation of revenues, and the proper application of the revenues. The statutory lien shall not be construed to give a holder or owner of a bond or coupon authority to compel the sale of the public improvement, the revenues of which are pledged to the improvement.

Here, however, Plaintiff never brought such an action to enforce a bondholder's statutory lien on Defendant's net revenues, nor did Plaintiff bring an action to compel Defendant to perform its duties. Furthermore, Plaintiff is not seeking an order from a court requiring Defendant to comply with the Ordinance. Instead, Plaintiff sought an order holding that, as a matter of law, Defendant cannot place the water charges on the tax rolls because Defendant failed to follow the Ordinance. Nothing in MCL 141.109, or any other statute for that matter, bars Plaintiff's claims.

Finally, Plaintiff has standing to raise the fact that Defendant violated the Ordinance because Plaintiff has a protected constitutional right to due process of law before Defendant is permitted to take Plaintiff's property. Article 1, § 17 of Michigan's 1963 Constitution states that no person shall be "deprived of life, liberty or property, without due process of law…." The due process clause provides Plaintiff with both substantive and procedural protections. *See, e.g. Bonner v City of Brighton*, 495 Mich 209, 220; 848 NW2d 380 (2014). Here, Defendant seeks to take Plaintiff's property in the form of either demanding payments for unpaid water charges or foreclosure of Plaintiff's real property. Under the due process clause, Plaintiff is entitled to certain protections before Defendant takes Plaintiff's property, including that Defendant actually follow the law for doing so. Defendant, however, violated Plaintiff's due process rights by failing to follow the procedural requirements as mandated by the Ordinance. As a result, Plaintiff is now entitled to raise Defendant's intentional violations of the Ordinance as a defense to Defendant's improper efforts to take Plaintiff's property.

C. Defendant Does Not Have Immunity From Its Improper Acts.

The COA Opinion summarily dismissed all of Plaintiff's remaining claims without Plaintiff getting an opportunity to complete discovery, including depositions. Defendant argues that such a result is warranted because regardless of what could be uncovered in discovery, Defendant has absolute immunity from Plaintiff's tort and equity claims. In support, Defendant makes a number of self-serving, defensive and false statements – none of which are supported by the factual record in this case because discovery had just started – including and in no way exhaustive:

(1) The "Subordination Agreement did not and could not harm [Plaintiff] in any way" (Defendant's Appeal Brief, at 26);

(2) Plaintiff does not get the benefit of the settlement funds Defendant received from the Subordination Agreement litigation between Defendant, the tenant, and the bank (*id*. at 26-27);

(3) The "Subordination Agreement and the litigation it spawned are just a distraction" (*id*. at 27);

(4) Plaintiff has not alleged facts justifying an exception to the immunity (*id*. at 33);

(5) The relief Plaintiff seeks will somehow "lead to discrimination among [water] customers" (*id*. at 36); and

(6) "[E]quity does not concern itself with the underbilled customer" (*id*. at 37).

Defendant's arguments, however, are wrong, without any record support, and Defendant is not entitled to immunity because these acts are proprietary in nature and not governmental functions. The secret Subordination Agreement is a "big deal" in this case and did material harm to Plaintiff, despite Defendant's dismissive claims to the contrary. Among other things, because of the Subordination Agreement the tenant did not pay the water charges. In fact, that agreement is such a big deal that Defendant actually had to file a separate lawsuit in order to have the Subordination Agreement retracted so that Defendant could recover monies from the bank and the tenant. In that very lawsuit Defendant claimed that its own Treasurer was not authorized to execute such an ill-fated and illegal agreement on behalf of the Defendant. Put simply, Defendant argued in that other lawsuit that the Subordination Agreement was not a governmental function and not enforceable.

Defendant cannot have it both ways: Defendant cannot claim on the one hand in a separate lawsuit that the Subordination Agreement was not a governmental function in order to recover a six figure settlement (which should be applied to the unpaid water charges at issue here), and then in this lawsuit take an entirely contradictory position in order to invoke immunity by claiming that the Subordination Agreement was meaningless and somehow a governmental function. *See, e.g. Holzbaugh v Detroit Bank & Trust Co*, 371 Mich 432, 436; 124 NW2d 267 (1963) ("'Among the rules which have become axiomatic is

one that a party must be consistent and not contradictory in the positions which he takes.'") (citation omitted).

Finally, Plaintiff's claims in this lawsuit will not undermine the water system, and will not lead to discrimination amongst customers. Such Defendant claims are pure theatrics and hyperbole proffered in order to avert this Court's attention away from the simple fact that, in this case, Defendant intentionally failed and refused to follow the Ordinance, and then committed a number of tortious and improper acts. Such improper acts by Defendant should not go rewarded.

D. Defendant Misrepresented To Plaintiff What Amounts Were Owed.

Defendant argues that Plaintiff is not entitled to assert tort and equity claims, or otherwise complain about the water charges, because the law imposes on Plaintiff constructive, not actual, notice of the water charges. *See* Defendant's Brief, at 2. Therefore, Defendant claims Plaintiff cannot claim ignorance that there were unpaid water charges.

Defendant, however, is not entitled to avail itself of such an argument because Defendant affirmatively misrepresented to Plaintiff each year that there were no such water charges, which turned out to be false. Specifically, by mandating that Defendant, each year, certify and place such unpaid water charges on the tax roll, Plaintiff is put on timely notice because the charge is then placed each year on the summer tax bill. As a result, Plaintiff can take the necessary steps to protect itself.

Here, Defendant intentionally did not timely certify and place the unpaid water charges on the tax roll each year and, as a result, those charges did not appear on Plaintiff's yearly tax bills. Defendant did this on purpose, and intentionally made these material misrepresentations that there were no unpaid water charges because Defendant concluded that it was in Defendant's best interest to keep the tenant in business in order to prevent Plaintiff from likely evicting the tenant, and to comply with the secret contractual agreements Defendant had made with the tenant and its bank (*i.e.*, the Subordination Agreement). As a result, Defendant sent to Plaintiff each year materially false tax bills which intentionally

misrepresented that there were no unpaid water charges. Defendant made these material false misrepresentations to induce Plaintiff into believing that there were no unpaid water charges. Further, Plaintiff was entitled to rely, and did rely, on Defendant's affirmative representations made by Defendant in those written tax bills. Under Michigan law, the doctrine of equitable estoppel applies to prevent Defendant from changing its position and now claiming that there were, in fact, unpaid water charges. *See Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999); *Huhtala v Travelers Ins Co*, 401 Mich 118, 132-133; 257 NW2d 640 (1977) ("Equitable estoppel is essentially a doctrine of waiver."); *Moore v First Sec Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997) ("Equitable estoppel arises when a party, by representations, admissions, or silence intentionally or negligently induces another party to believe certain facts.").

E. Conclusion.

Plaintiff respectfully requests that this Court issue an order (1) granting Plaintiff's application for leave to appeal, (2) vacating and reversing the COA Opinion, (3) affirming the Circuit Court Order, (4) awarding Plaintiff costs including attorneys' fees, and (5) awarding Plaintiff any other relief this Court deems necessary and just.

Respectfully submitted,

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